

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SKY-STEVEN THOMAS MILLER,

Plaintiff,

v.

PERRY B. BARTRAM, JR., *et al.*,

Defendants.

No. C09-5094 FDB/KLS

ORDER DENYING THIRD MOTION TO
COMPEL DISCOVERY AND MOTION
FOR SANCTIONS

Before the court are Plaintiff's Third Motion to Compel Discovery (Dkt. 53) and Motion for Sanctions (Dkt. 57). Having reviewed the motions, Defendants' response (Dkt. 60), and balance of the record, the Court finds that the motions should be denied.

DISCUSSION

"On notice to other parties and all affected persons, a party may move for an order compelling . . . discovery," including an order to compel production, or if "a party fails to respond . . . as requested under" Fed. R. Civ. P. 34. Fed. R. Civ. P. 37(a)(1), (a)(3)(B)(iii). "The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). "If the motion is granted -- or if the . . . requested discovery is provided after the motion was filed -- the court must, after giving

1 opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or
 2 attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in
 3 making the motion, including attorney's fees," except if:

4 (i) the movant filed the motion before attempting in good faith to obtain the . . .
 5 discovery without court action;

6 (ii) the opposing party's nondisclosure, response, or objection was substantially
 7 justified; or

8 (iii) other circumstances make an award of expenses unjust.

9 Fed. R. Civ. P. 37(a)(5)(A). In addition, the Court may "apportion the reasonable expenses"
 10 incurred, in the event the motion "is granted in part and denied in part." Fed. R. Civ. P.
 11 37(a)(5)(C).

12 This is Plaintiff's third motion to compel discovery relating to Defendants' August 3,
 13 2009 responses to two requests for production of documents. The court dealt with the majority
 14 of Plaintiff's motion in its Order dated October 9, 2009 (Dkt. 33) and denied Plaintiff's second
 15 motion (Dkt. 48) because Plaintiff failed to include a certification in accordance with
 16 Fed.R.Civ.P. 37(a)(2)(B). Dkt. 48, p. 2. In addition, the Court directed the parties to confer
 17 telephonically. *Id.* In his "Certificate of Compliance with CR 26(i) and Local Rule 37(e),
 18 Plaintiff identifies "18 documents [he] is asking the court to make ruling on." Dkt. 56, p. 4. The
 19 court addresses each of these in turn:
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21 1. *Defendant Bartram's License to Practice Medicine*

22 During the parties' teleconference on February 17, 2010, Plaintiff advised counsel that
 23 Defendants had not responded to his request for licensing information on P.A. Bartram. After the
 24 teleconference, counsel rechecked the file and confirmed that this appeared to be the case, and he
 25 obtained the licensing information from the Department of Health web page which indicated that
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1 P.A. Bartram had a valid active license and sent a copy of this to plaintiff and the court two days
2 later. Dkt. 61, pp. 2-3; Dkt. 51, Exh. A.

3 As Plaintiff is now in possession of information reflecting that Dr. Bartram was licensed,
4 Plaintiff's motion to compel this information is **DENIED**.

5 *2. Copy of Certificate from Washington State's Medical Quality Assurance*
6 *Commission and Copy of Contract with DOC to Practice Medicine at McNeil Island*
7 *Correctional Center*

8 The time for filing a discovery motion on these requests has passed. See Dkt. 33
9 (discovery deadline extended until December 10, 2009) and Dkt. 48 (discovery deadline
10 extended until March 5, 2010 for limited purpose of resolving questions surround the production
11 of documents identified in Dkt. 33). In addition, Plaintiff offers no explanation and the court
12 sees no relevance of these requests to his claim that he was denied special orthotic shoes and that
13 he suffered a fall as a result of his old footwear. Accordingly, Plaintiff's motion to compel
14 responses to these requests are **DENIED**.

15 *3. Copy of Original 11 Medical Kites*

16 In Request No. 11, Plaintiff asked for a "[c]opy of all medical kites" he filed between the
17 period of January 2008 and June 2009. Dkt. 33, p. 6. The court ordered that to the extent the
18 kites he seeks are not contained in his medical file . . . and to the extent that they actually exist
19 and are in DOC's possession, Defendants shall provide the requested documents. *Id.* Plaintiff
20 again moves the court to compel production of the kites, however he attaches them to his
21 affidavit stating that "the 11 medical kites Plaintiff is serving on the court are the 11 medical
22 kites the defendant destroyed and that all 11 medical kites are true and correct carbons from a 3-
23 part medical kite form." Dkt. 54, p. 2. Defendants respond that they do not have the kites in
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1 their possession (except that they have now received them as attachments to Plaintiff's motion).
2 Dkt. 60, p. 2.

3 Plaintiff insists that he needs copies of the originals so that they can be entered into
4 evidence. Dkt. 53, p. 6. Plaintiff states that the kites in his possession are one part of a three part
5 carbon form. Defendants represent to the court that they are not in possession of any originals.
6 Thus, Plaintiff's motion to compel the originals of the kites is **DENIED**. Moreover, Plaintiff has
7 duplicates of the originals, which are admissible to the same extent as an original unless (1) a
8 genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would
9 be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003.¹

11 4. *Copy of the Original Primary Encounter Report dated 7/25/08*

12 Plaintiff states that he is entitled to production of a "copy of the original primary
13 encounter report dated 7/25/08 not the altered one provided in discovery." Dkt. 56, p. 3.
14 Defendants argue that after Plaintiff first raised this issue, counsel sent the attorney general
15 investigator to travel to McNeil Island to personally examine Plaintiff's original medical file to
16 confirm that the original of this encounter report in Plaintiff's file is the unaltered version, not
17 the altered one that plaintiff claims is somehow the original.² Counsel for Defendants states
18 further in his declaration as follows;

19
20 As soon as I received a copy of the different encounter report record, I sent my
21 investigator to McNeil Island to determine, if he could, what it was and where it
22 came from. It was reported to me that this version was not in his medical file and I
23 verified it was not in the copy of the medical file that I had previously received
24 and the copy of which this office agreed to send to plaintiff. My investigator was
unable to determine the source of the version plaintiff provided. My investigator
called the telephone number written on plaintiff's supplied version and learned

25 ¹ To be admissible, the kites must also be relevant to Plaintiff's claims in this action.

26 ² Plaintiff claims to have received the altered document in discovery and cites to his Exhibit F. Defendants assert
that the document Plaintiff received in discovery is Attachment D to Plaintiff's Declaration which has the
defendants' discovery number at the bottom: MED000020. Dkt. 53, p. 39.

1 that it was a scheduling service for Dr. Brewer. I could speculate that someone
2 made a copy of plaintiff's encounter report to use to contact Dr. Brewer and this
3 copy somehow came into plaintiff's possession, but I have no evidence to support
4 this speculation.

5 Dkt. 61, p. 2.

6 Based on the representations of Defendants and counsel that Plaintiff has been provided a
7 copy of the unaltered report and that Defendants' investigator was unable to confirm the source
8 of the "altered" version, the court finds that Plaintiff's motion to compel an "unaltered" version
9 of the encounter report is **DENIED**.

10 *5. Request for Production Served on December 28, 2009*

11 On December 9, 2009, counsel for Defendants took a telephonic deposition of Plaintiff.
12 Dkt. 61, p. 2. Following that deposition, the parties participated in a Rule 26(i) conference
13 during which counsel for Defendants indicated to Plaintiff that he had not received Plaintiff's
14 responses to Defendants' requests. *Id.* Plaintiff indicated that he had mailed his responses to
15 counsel's office. *Id.* After further search, counsel located the documents sent by plaintiff and
16 counsel's office informed Plaintiff that the answer had been found. *Id.* On December 28, 2009,
17 Plaintiff sent a discovery request directed to counsel asking (1) where the missing discovery sent
18 by plaintiff was found by counsel, (2) when counsel found the missing discovery, and (3) for a
19 photocopy of the envelope the missing discovery was sent in showing the postmark. Dkt. 56, p.
20 4; Dkt. 60, p. 3; Dkt. 53, Attach H.

21 Plaintiff's December 28, 2009 request was sent after the close of discovery. See Dkt. 33
22 (discovery deadline extended until December 10, 2009) and Dkt. 48 (discovery deadline
23 extended until March 5, 2010 for limited purpose of resolving questions surround the production
24 of documents identified in Dkt. 33). In addition, a request seeking where and when counsel
25 found the discovery sent by Plaintiff to defense counsel is not relevant nor likely to lead to the
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1 admissibility of relevant evidence relating to the issues raised in Plaintiff's complaint.

2 Accordingly, Plaintiff's motion to compel responses to his request for production sent on
3 December 28, 2009 is **DENIED**.

4 Based on a review of the parties' filings in this case, the court finds that Plaintiff's
5 request for sanctions against Defendants for failure to respond to discovery and for the
6 destruction of evidence is without merit. The court finds no evidence of bad faith or spoliation
7 of evidence.
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9 The court will not entertain further motions raising the same issues resolved herein and
10 will proceed with consideration of Defendants' motion for summary judgment (Dkt. 44). Any
11 further motions raising the same discovery issues may result in sanctions, including dismissal of
12 this action.

13 Accordingly, it is **ORDERED**:

14 (1) Plaintiff's third motion to compel (Dkt. 53) is **DENIED**.

15 (2) Plaintiff's motion for sanctions (Dkt. 57) is **DENIED**.

16 (3) The Clerk of the Court shall send copies of this Order to the Plaintiff and counsel
17 for Defendants.
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19 DATED this 12th day of March, 2010.
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23 Karen L. Strombom
24 United States Magistrate Judge
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